IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 96 OF 2004

1. Mr. Jose Juliao Marino Cipriano Rodrigues alias Juliao Rodrigues, major of age, Son of late Antonio Sebastiao Bernardo Rodrigues, Commercial Employee, and his wife

2. Mrs. Leonora Rosaria Rodrigues alias Leonora Rodrigues, major of age, hoiusewife, both residing at Araddy, House No.542, Guirim, Bardez, Goa ..... Appellants.

V/s.

1. Mr. Apolinario Francisco Facundo Santana Rodrigues, major of age, son of late Antonio Sebastiao B. Rodrigues, Businessman, and his wife,

2. Mrs. Augusta Fernandes e Rodrigues, major of age, housewife, both residing at Poriebhat, House No.658, Verna, Salcete, Goa. ..... Respondents.

Mr. S.D. Lotlikar, Sr. Advocate with Miss. Shreya Naik, Advocate for the appellants.

Mr. A.F. Diniz, Advocate for the respondents.

CORAM : S.S. PARKAR, J.

DATE : 22ND JUNE, 2005.

ORAL ORDER :

Heard. The dispute is with regard to the two properties, i.e. two paddy fields and one tavern shop. The trial Court has rejected the counter claim of the respondents/defendants on the ground that though the certificate of the Communidade was produced, the application made to the said Authority for transfer of the tenancy rights was not produced. Both the properties are tenanted properties. The father/father-in-law of the appellants and the respondents who was original tenant of the properties, died in the year 1969 and in that year only the respondent No.1/defendant No.1 got the tenancy in respect of the paddy fields transferred in his name. Respondent No.1 is running the tavern since after the death of his father and the excise licence stands in his name since the year 1971. In the appellate Court, the respondents produced the application made to the Communidade, in which the consent of the mother of respondent No.1 and respondent No.1, was obtained, on the basis of which tenancy has been transferred in the name of respondent No.1. No doubt appellant No.1 disputed his signature on the application giving consent for transfer of the tenancy in the name of respondent No.1, but the appellate Court has held that the appellants have not challenged the certificate issued by the Communidade in the name of defendant No.1. In order to file a suit for partition, it is necessary, under law, to establish that the property belonged to the father. The father was not the owner of the said two properties which are in dispute, but he was a tenant and the said

tenancy has been transferred as per the provisions of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 and the Rent Act in the name of defendant No.1.

2. It is pertinent to note that in respect of the paddy fields the respondents are new owners as they have purchased the said paddy fields under the provisions of the Agricultural Tenancy Act. In view of the above, the submission made on behalf of the appellants that the properties standing in the name of the respondents, are held by them on behalf of the appellants, has no substance.

3. It is pointed out on behalf of the respondents that the certificate issued by the Communidade shows that the mother and appellant No.1 had given consent for transfer of the tenancy in the name of respondent No.1 and before the trial Court, the appellant has not denied that he had given consent, but only stated that he did not remember. The trial Court had held that the respondent/defendant had not produced the application and, therefore, the same was produced by the respondents in appeal Court.

4. On behalf of the respondents a Judgment of this Court in the case of ***Shri Cruz Fernandes and anr. vs. Smt. Gregorina Estefania Sofia Fernandes and ors. (***1991 (2) Goa L.T. 42) has been relied upon,

in which it has been held that no suit for physical partition of a common and undivided properties lies unless and until previously the rights of the parties have been established and determined by a competent public deed of partition or by judicial decree in the competent inventory proceedings. Since the tenancy in respect of the disputed properties was transferred in the name of the respondents, it was necessary for the appellants to first initiate inventory proceedings and establish that the disputed properties could have been the subject-matter of the suit for partition. In view of the aforesaid facts, reliance placed by the Counsel for the appellants on the provisions of Order 41 Rule 27 of the C.P.C. and the Judgment of the Supreme Court in the case of ***Karnataka Board of Wakf vs. Government of India and ors.*** ((2004) 10 SCC 779, is of no assistance to the appellants.

5. In view of the aforesaid facts and circumstances, no substantial question of law arises in this case. However, it is open to the appellants, if entitled under the law, to challenge the transfer of tenancy pursuant to the certificate issued by the Communidade on the the consent given by the appellant No.1 and his mother, if so advised.

6. In view of the above, the second appeal is dismissed.

S.S. PARKAR, J.

ssm.